Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13715/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**

On 14 May 2015 **On 26 June 2015**

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Before

THE HONOURABLE LORD MATTHEWS
UPPER TRIBUNAL JUDGE DAWSON
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

T L B L
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Presenting Officer
For the Respondent: In person accompanied by her husband

DECISION AND REASONS

1. This appeal arises out of a challenge to the decision of First-tier Tribunal Judge Eban who for reasons given in her decision promulgated 9 January 2015 allowed the appeal by the respondent (whom we shall refer to as the claimant) against the decision of the Secretary of State dated 28 February

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2014 refusing her application for a derivative residence card as the primary carer of T, a British citizen born September 2013.

2. The Secretary of State had refused the application on the basis of an insufficiency of evidence to demonstrate that T would be unable to remain in the United Kingdom or the European Economic Area were she forced to move. The claimant had not provided evidence why T's father, the claimant's husband, R L, was not in a position to care for T if she were forced to leave the UK. He is a British citizen. The respondent considered, based on the indication that the family were living together, that the parents had assumed joint care and responsibility of T and were both involved in her day-to-day decisions. Mr L was however an "exempt person" because of his citizenship and thus the claimant did not satisfy Regulation 15A(7) of the Immigration (European Economic Area) Regulations 2006 (the Regulations).

3. The Secretary of State also observed that the claimant had stated she wished to rely on family or private life established in the United Kingdom under Article 8 of the Human Rights Convention. The decision referred to the relevant Immigration Rules and in order for such a matter to be considered the claimant was required to make a separate "charged application" using the appropriate application form (FLR(M)) etc.

4. Section 55 of the Borders, Citizenship and Immigration Act 2009 were also addressed and it was explained that T's position had been considered in the light of the statutory provision, s.11 of the Children's Act 2004 and the Supreme Court ruling in *ZH* (Tanzania) [2011] UKSC 4.

5. The decision includes the observation that the decision not to issue a derivative residence card did not require the claimant to leave the United Kingdom if she could otherwise demonstrate that she had a right to reside under the Regulations.

6. By way of background, the couple had married in the United Kingdom in 2003 and then travelled to the United States of America where T was born. The family returned to the United Kingdom in 2011 and have remained here as a family unit since then.

7. The judge heard evidence from the claimant and her husband who were unrepresented. She observed the evidence that Mr L suffers from depression as well as other health issues and as a result was unable to work. T is at school and is in year 5. Her behaviour is described as extremely challenging and she has been diagnosed with ADHD. She has been expelled from schools in the United Kingdom. Neither the claimant nor Mr L can cope with T for any more than a very short time on their own and they work together as a team with her. All important decisions are made jointly.

8. The judge approached the task before her with the observation that there had been no indication that the respondent had sought in any way to assess the effect of the decision under the appeal on T's welfare. She concluded at [8]:

> "... I consider that this is one of the extremely rare cases where, notwithstanding that the burden is on the appellant, the respondent should have satisfied herself that she was informed about T's best interests. Information is missing from the papers before me, which means that I am unable to reach decision on whether if the appellant had to leave the UK, T would be unable to continue to reside in the UK."

9. The judge continued at [9]:

> "It follows that the respondent's decision is flawed because she did not give any appropriate consideration to T's welfare. Clearly once the respondent makes inquiries of the appellant and Mr L about their circumstances and those of T, it will be incumbent on the appellant to provide whatever information the respondent requires ..."

She then set out the nature of the material she considered the claimant should provide.

10. Without more, the judge allowed the appeal to the extent that the decision was not in accordance with the law on the basis that the Secretary of State had given no proper consideration to s.55 of the Borders, Citizenship and Immigration Act 2009.

11. The challenge to that decision is two-fold. As to the first, it is argued that, on the evidence produced, it is clear that T could remain in the United Kingdom with her father who is an "exempt person" for the purposes of the Regulations. There was no reason why s.55 or Article 8 should have prevented the appeal being dismissed.

12. The second ground is that in respect of s.55 and Article 8 the judge ought to have been able to decide the matter including consideration of T's best interests.

13. We heard submissions from Mr Whitwell and brief observations from Mr and Mrs L. Thereafter we announced that the appeal by the Secretary of State was allowed; the decision of the First-tier Tribunal Judge was set aside which we remade and dismissed the appeal against the decision under the Regulations. We urged Mr and Mrs L to take legal advice in respect of her position with particular reference to Article 8 and the Secretary of State's policy on the parents of British citizen children.

14. Our reasons for finding error are as follows. The judge was required to decide the correctness of the refusal by the Secretary of State to issue a derivative residence card. She failed to do so and impermissibly by considering s.55, appears to have misunderstood the approach she was required to take and the relevance of this statutory provision to the decision under appeal.

15. Regulation 15A of the Regulations provides, so far as is relevant to the facts of this case:

> "15A. Derivative Right of Residence

(1) A person (‘P') who is not an exempt person and who satisfies the criteria in ... (4A) ... of this Regulation is entitled to a derivative right to reside in the United Kingdom for so long as P satisfied the relevant criteria.

(2) – (4) ...

(4A) P satisfies the criteria in this paragraph if –

(a) P is the primary carer of a British citizen (the relevant ‘British citizen’);

(b) the relevant British citizen is residing in the United Kingdom; and

(c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.

(5) ...

(6) For the purpose of this Regulation –

(a) ...

(b) ...

(c) An ‘exempt person’” is a person –

(i) who has a right to reside in the United Kingdom as the result of any other provisions of these Regulations;

(ii) has a right of abode in the United Kingdom by virtue of Section 2 of the 1971 Act;

(iii) ...

(iv) ...

(7) P is to be regarded as a ‘primary carers’ of another person if

(a) P is a direct relative or a legal guardian of that person; and

(b) P -

(i) is the person who has primary responsibility for that person's care, or

(ii) shares equally the responsibility for that person's care with one other person who is not an exempt person

7A. Where P is to be regarded as a primary carer of another person by virtue of paragraph (7(b)(ii)) the criteria in paragraph 2(b)(iii), 4(b) and 4A(c) shall be considered on the basis that both P and the person with whom care responsibility is shared would be required to leave the United Kingdom.

(7(B) – (9) ...”

16. Regulation 15A(4A) was inserted to comply with the CJEU's ruling in *Ruiz Zambrano v ONE* [2012] EUECJC-34-09 where it was held:

> "(i) Article 20 of the TFEU 'precludes national measures which have the effect of depriving citizens of the European Union of the genuine enjoyment of the substance of rights conferred by virtue of their status as citizens of the European Union' (paragraph 42); and
>
> (ii) A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside has such an effect (paragraph 43) because 'it must be assumed that such a refusal would lead to a situation where those children, citizens of the European Union, would have to leave the territory of the European Union in order to accompany their parents'."

17. The scope of the principle in *Zambrano* was considered in detail by the Court of Appeal in *Harrison v SSHD* [2012] EWCA Civ 1736 where Elias LJ held at [63] that the *Zambrano* principle would not apply except where the EU citizen is effectively forced to leave the country of the EU.

18. Vos LJ considered the applicable principles where there is another relative able to care for the child in *Hines v Lambeth* [2014] EWCA Civ 660 at [21] to [23]:

> "21. Accordingly, in my judgment, the judge was right, applying *Harrison*, to conclude as he did in paragraph 21 of his judgment that the complainant was only entitled to accommodation if Brandon would be effectively compelled to leave the United Kingdom if she left. He was also right to point out that what amounts to circumstances of compulsion may differ from case to case. As Elias LJ said: 'to the extent that the quality or standard of life [of the EU citizen] will be seriously impaired by excluding the non EU national, that is likely in practice to infringe the right of residence itself because it will effectively compel the EU citizen to give up residence and travel with the non-EU national'.
>
> 22. In my judgment, however, the welfare of the child cannot be the paramount consideration because that would be flatly inconsistent with the statutory test which is whether the child would be unable to reside in the UK if the mother left. It will, in normal circumstances, be contrary to the interests of a child for one of its parent carers, whether the primary carer or not, to be taken away from him or her. It would certainly be contrary to Article 24(3) of the Charter. But Mr Berry shied away from contending that the Immigration Regulations were inconsistent with EU law or that they should be read down so as to comply with it.
>
> 23. I have no doubt that the test applicable under Regulation 15A(4A)(c) is clear and can be given effect without contravening EU law. The reviewer has to consider the welfare of the British citizen child and the extent to which the quality or standard of his life will be impaired if the non-EU citizen is required to leave. This is all for the purpose of answering the question whether the child would, as a matter of practicality, be unable to remain in the UK. This requires a consideration, amongst other things, of the impact which the removal

of the primary carer would have on the child, and the alternative care available for the child."

19. Thus it emerges from that decision (1) the test in 15A(4A)(c) does not contravene EU law and furthermore the welfare of the child cannot be the paramount consideration.

20. In our view, the judge erred by failing to make any decision on whether the claimant satisfied the criteria in 15A(4A) and furthermore failed to make any findings on the evidence given. The judge was required to reach a decision on that evidence despite her view on its adequacy. The second error relates to the judge's understanding of the role of s.55 of the 2009 Act. In observing that the Secretary of State's decision was flawed because there had been no appropriate consideration of T's welfare, the judge was in effect posing the wrong question.

21. We explained at the hearing that we considered these errors to be material and set aside the decision.

22. As to its remaking, there is no dispute that Mr Harrison is an exempt person by virtue of his nationality and thus right of abode. In order to be regarded as a "primary carer" it is incumbent upon the claimant to demonstrate her undisputed relationship to T but also that she shares equally the responsibility for T's care with one other person who is not an exempt person (reg.15A(7)).

23. It is not the claimant's case that she has primary responsibility for T's care. Even though the judge reached no conclusion on the evidence, the case put was one of shared responsibility. Mr L therefore has a role in T's upbringing and although that evidence was of the claimant and Mr L finding it difficult to cope, we are not persuaded that the claimant has been able to establish that she has primary responsibility for T's care by virtue of those circumstances.

24. Accordingly the claimant is unable to bring herself within the criteria in reg.15A(4A) and thus recognition of a derivative right of residence.

25. The grounds of appeal to the FtT relied on Article 8 and s.55 of the 2009 Act. We have no doubt that it is in the best interests of T that both parents should remain together. But as we have observed above, those interests are not paramount. The question to be asked is not where the best interests lie but whether the departure of the claimant from the United Kingdom would result in an inability for T to continue to reside in the United Kingdom.

26. Turning to Article 8, t is clear that the best interests are a primary consideration in assessing the proportionality of any further interference. However, in our view Article 8 is not engaged by virtue of the Secretary of State's decision. That decision did not result in the claimant no longer having leave to remain and thus resulting in criminal presence. Accordingly the principles in J*M v SSHD* [2006] EWCA Civ 1402 are not applicable.

27. The claimant was invited in the decision to make application should she consider that any future removal would interfere with her right to private and family life under Article 8. That option remains open to her. We urge the claimant to take legal advice.

28. By way of conclusion, therefore, we set aside the decision of the First-tier Tribunal for error of law. We remake the decision by dismissing the appeal.

Signed

Upper Tribunal Judge Dawson

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the child T is granted anonymity. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Dawson